

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION**

PAULINE H. SULLIVAN

PLAINTIFF

VERSUS

CIVIL ACTION NO. 1:99CV136-P-D

**NATIONAL STATES INSURANCE
COMPANY and BERNARD VANLANDINGHAM**

DEFENDANTS

MEMORANDUM OPINION

This cause is before this Court on plaintiff's Motion to Remand. The Court, having reviewed the motion, the briefs of the parties, the authorities cited and being otherwise fully advised in the premises, finds as follows, to-wit:

FACTUAL BACKGROUND

In February 1997, Bernard VanLandingham visited with Mr. and Mrs. Sullivan in their home in Louisville, Mississippi for purposes of soliciting their applications for life insurance coverage through National States. He assisted them in completing the application process—i.e., he asked them the questions and recorded their answers on the forms. When Mr. Sullivan revealed he suffered from congestive heart failure, VanLandingham told him it would not be necessary to reveal the existence of the condition if he had not yet suffered a heart attack due to the disease. The Sullivans signed their respective application forms without reading them; VanLandingham forwarded them to National States. The policies were issued.

In August 1998, Mr. Sullivan died, possibly due to the heart condition disclosed to VanLandingham but not reported on the insurance application. Mrs. Sullivan contacted VanLandingham following her husband's death; VanLandingham expressed reservations over whether National States would pay the claim since the condition had not been disclosed on the application and expressed regret that Mr. Sullivan had not lived 2 years from the date of the

issuance of the policy—as the noncontestability provision of the policy would then have precluded National States from denying the claim on grounds of the nondisclosure. Mrs. Sullivan was understandably upset and her complaint includes allegations that she was unable to provide for her husband’s burial as they had mutually agreed; because she could not count on the insurance proceeds from the National States policy, she was forced to make more modest burial arrangements for Mr. Sullivan. The complaint alleges damages in the nature of emotional distress.

Predictably, National States reacted to Mrs. Sullivan’s claim by rescinding the policy and refunding \$464.36, representing the total of all premiums paid under the policy. In December 1998, Mrs. Sullivan’s attorney wrote a demand letter to National States, recounting the circumstances under which the Sullivan application was solicited and seeking payment of the benefits due under the policy, as well as an additional sum in compensation for the damages suffered by Mrs. Sullivan as a result of the allegedly improper denial. National States responded on December 16, 1998; while the company steadfastly denied any wrongdoing, it characterized the sum at issue as too minimal to justify potential litigation. The company therefore agreed to pay the face amount of the claim less the previously tendered refund of premiums, in all \$5,667.87; the company did not acknowledge or offer to settle Mrs. Sullivan’s claims for damages due to mental distress—in spite of a second inquiry by Mrs. Sullivan’s attorney.

On March 19, 1999, Mrs. Sullivan filed suit in the Circuit Court of Winston County, Mississippi against National States and Bernard VanLandingham, alleging the foregoing facts and seeking recovery of actual and consequential damages of \$100,000 and punitive damages in the sum of \$5,000,000. On April 22, 1999, Sullivan filed an amended complaint, reducing her ad

damnum clause to \$70,000 actual damages, but maintaining her claim for \$5,000,000 in punitive damages.

National States removed the instant action to this Court on April 22, 1999. The jurisdictional ground for removal was 28 U.S.C. § 1332 respecting matters between parties of diverse citizenship and involving an amount in controversy in excess of \$75,000, exclusive of interest and costs. National States alleged that Bernard VanLandingham, a citizen of Mississippi and a resident of Louisville, Mississippi, was fraudulently joined for purposes of defeating diversity jurisdiction, and that as a result, this Court should disregard VanLandingham for purposes of determining whether the action was removable.

Plaintiff filed her motion to remand on or about May 7, 1999 and seeks this Court's entry of an order remanding the case to the Circuit Court of Winston County. The matter has been fully briefed and is ripe for this Court's determination.

LEGAL ANALYSIS

Plaintiff seeks remand on the ground of defendant's failure to meet either of the requirements for jurisdiction under 28 U.S.C. § 1332—i.e., diversity of citizenship and an amount in controversy in excess of \$75,000, exclusive of interest and costs. Pursuant to § 1332, this Court lacks jurisdiction if the citizenship of the plaintiff is not completely diverse with the defendants. Both Mrs. Sullivan and VanLandingham are citizens of Mississippi; it is Mr. VanLandingham's joinder as a defendant which renders the instant removal problematic.¹ Defendant National States urges that VanLandingham was fraudulently joined in an effort to

¹ It is undisputed that since National States is a foreign corporation having its principal place of business in Missouri, the requirement of diversity between parties would be met were Mr. VanLandingham's citizenship disregarded.

defeat federal jurisdiction.

It is axiomatic that the party seeking removal bears the burden of proving the jurisdictional prerequisites. Where the basis for removal is diversity jurisdiction based on allegation of fraudulent joinder, a defendant bears a heavy burden of establishing the right to a federal forum. The removing defendant must present clear and convincing evidence of fraudulent joinder in order to avoid remand. Rogers v. Modern Woodmen of America, 1997 WL 206757, *2 (N.D. Miss. 1997). Furthermore, in determining whether the joinder of a party was fraudulent, the district court “must evaluate all of the factual allegations in the light most favorable to the plaintiff, resolving all contested issues of fact in favor of the plaintiff.” B., Inc. v. Miller Brewing Co., 663F.2d 545, 549 (5th Cir. 1981). Similarly, any uncertainties in the substantive law must also be resolved in favor of the plaintiff. Head v. United Ins. Co. of America, 966 F. Supp. 455, 457 (N.D. Miss. 1997).

There are three means by which a defendant can make the requisite showing of fraudulent joinder: First, a defendant may establish outright fraud in the plaintiff’s pleading of jurisdictional facts. Second, a defendant can establish that there is no possibility of recovery under the facts pled in the complaint. Third, a defendant can establish fraudulent misjoinder where the facts pled are “so clearly false as to demonstrate that no factual basis existed for any honest belief on the part of the plaintiff that there was joint liability. Rogers at *2.

Defendant relies only on the second proposition; National States contends that under the facts pled, there is no basis under Mississippi law for a recovery against VanLandingham. The existence of a cognizable claim is to be determined by reference to the allegations contained in the plaintiff’s state court pleadings. Ironworks Unlimited v. Purvis, 798 F. Supp. 1261, 1263

(S.D. Miss. 1992).

National States places great stock in the general proposition that “an agent for a disclosed principal incurs no liability for a breach of duty or a contract perpetrated by its disclosed principal and a third party.” Gray v. United States Fidelity and Guaranty, 646 F. Supp. 27, 29 (S.D. Miss. 1986). National States attempts to minimize the importance of the allegations relative to VanLandingham, emphasizing instead that the complaint alleges that he “was acting as authorized agent for and with full authority of National”² and characterizes the theory of recovery as the “Defendants’ bad faith failure to pay benefits.” National States thus contends that VanLandingham cannot be held liable for any breach of contract committed by the company.

However, the caveat to the general rule discussed above is that, where the complaint includes allegations which establish a separate and independent tort against the agent, individual liability will attach. Id. See also McFarland v. Utica Fire Insurance Co. of Oneida County, 814 F. Supp. 518, 521 (S.D. Miss. 1992). The “independent tort” exception has been applied to impose liability on an agent for bad faith breach of an insurance contract. Ironworks at 1263 (citing Dunn v. State Farm Fire and Casualty Co., 711 F. Supp. 1359 (N.D. Miss.

² Nor can the allegation of an agency relationship between VanLandingham and National States be construed as an admission that VanLandingham cannot be held individually liable for any tortious acts he may have committed. See Wheeler v. Frito-Lay, Inc., 743 F. Supp. 483, 485-86 (S.D. Miss. 1990)(rejecting assertion that a complaint which cast claim in terms of respondeat superior and sought a joint and several judgment against both agent-employee and employer conclusively established employee’s lack of individual liability, and hence, fraudulent joinder).

1987)(involving negligent investigation of claim)). While acknowledging as much, National States blithely ignores the wrongful acts allegedly perpetrated by VanLandingham at the time of contract solicitation and weakly asserts only that VanLandingham did not participate in the adjustment or denial of the claim in question. VanLandingham admittedly did not participate in the investigation or adjustment process; but the Complaint does allege facts which implicate him as the proverbial “lying agent.” Nicholas v. Shelter Life Ins. Co., 923 F.2d 1158 (5th Cir. 1991); Andrew Jackson Life Ins. Co. v. Williams, 566 so.2d 1172 (Miss. 1990). An agent who commits fraud may be held liable under his principal’s contract. Thompson v. Nationwide Mutual Insurance Co., 971 F. Supp. 242, 243 (N.D. Miss. 1997). VanLandingham’s alleged actions, under the facts as pled in the Complaint, support a claim for intentional misrepresentation under Mississippi law.

In order to establish a right to recovery for intentional misrepresentation, a plaintiff must establish the following elements:

- 1) A representation;
- 2) Its falsity;
- 3) Its materiality;
- 4) The speaker’s knowledge of its falsity or ignorance of its truth;
- 5) His intent that it should be acted upon by the person and in the manner reasonably contemplated;
- 6) The hearer’s ignorance of its falsity;
- 7) His reliance on the truth;
- 8) His right to rely thereon; and

9) His consequent and proximate injury

Knight v. Armstrong Rubber Company, 1991 WL 532493, *11 (S.D. Miss. 1991). Under the facts as pled in the complaint, VanLandingham assisted the Sullivans in completing their respective insurance applications; when Mr. Sullivan disclosed, in response to VanLandingham's question, that he suffered from congestive heart failure, VanLandingham advised him that a negative response to the question was appropriate so long as Mr. Sullivan had not suffered a heart attack in conjunction with the condition. The only reasonable inference that may be drawn from VanLandingham's behavior in this regard is that he intended, indeed expected, the Sullivans to rely on his statement. Based on the facts as pled, the Sullivans accepted (relied) on VanLandingham's statement and permitted the agent to complete the form with a negative response to the question concerning treatment for the listed medical conditions. Considering the way in which events subsequently developed and Mr. VanLandingham's alleged statement to Mrs. Sullivan after learning of Mr. Sullivan's death, it is reasonable to infer that the agent was aware of his misstatement at the time it was made or, at best, spoke in deliberate ignorance and with complete disregard for the consequences to the Sullivans. And finally, certainly the complaint contains sufficient allegations of injury due to the misstatement.³

National States unconvincingly asserts in its brief in opposition to remand that plaintiff's first allegations of misrepresentation appear on the motion to remand, i.e., that "VanLandingham, as agent of National, made material representations to the Plaintiff as to the reliability of National

³ National States attempts to focus its argument solely on the decision to deny Mrs. Sullivan's claim and to rescind the policy, ignoring in all practicality the fact that were it not for VanLandingham's alleged conduct during the application process, there would be no need for the present litigation.

as a insurance company and thereby induced Plaintiff to acquire insurance from National and instructed her [sic] what answers to the application form were satisfactory and, in fact, filled in the answers in his own hand.” Defendant’s Brief at p. 10. Defendant baldly ignores the fact that the Complaint plainly includes allegations concerning VanLandingham’s role in advising Mr. Sullivan of the appropriate response to the question concerning his medical condition. Even disregarding the additional assertions made by plaintiff in her motion to remand, which the Court considers merely an effort to clarify the basis for recovery stated in the Complaint, it is evident from the foregoing analysis that the Complaint sufficiently states a claim against VanLandingham under Mississippi law. National State’s contention that “[n]owhere in any of Plaintiff’s Complaints does she use the word misrepresentation” simply ignores that the burden of proving fraudulent joinder rests with the party seeking removal:

This court does not engage in a determination of whether the plaintiff’s complaint is sufficient under the applicable rules of pleading or civil procedure. Rather, this court merely takes as true the allegations from the plaintiff’s complaint in determining if there is any possibility of recovery against the non-diverse defendant: . . . if there is even a possibility that a state court would find a cause of action stated against any one of the named in-state defendants on the facts alleged by the plaintiff, then the federal court must find that the in-state defendant(s) have been properly joined, that there is incomplete diversity, and that the case must be remanded to the state courts.

Rogers at *3 (emphasis added).⁴ The inadequacies asserted by defendant National States amount to no more than mere gripes concerning inartful pleading on the part of plaintiff’s counsel.

Shavers v. Beverly Enterprises-Mississippi, Inc., 977 F. Supp. 1259, 1262 (N.D. Miss. 1997).

⁴ Accord, Richardson Carbon & Gasoline Co. v. Interenergy Resources Ltd., 99 F3d 746, 751 (5th Cir. 1996)(“If there is any possibility that the plaintiff has stated a cause of action against a non-diverse defendant, the federal court must conclude that joinder is proper, thereby defeating complete diversity, and the case must be remanded.”).

See also Branson v. Nissan Motor Acceptance Corp., 963 F. Supp. 595, 597 (ordering remand where facts alleged in plaintiff's complaint supported cause of action for breach of peace, despite the fact that the complaint itself did not allege it as a specific legal theory of recovery).

Based on the foregoing analysis, this Court cannot say that there is "no possibility" that the plaintiff will be able to recover in state court against the defendant VanLandingham.

National States has failed to demonstrate to this court, by clear and convincing evidence, that the defendant VanLandingham has been fraudulently joined in this action to defeat the exercise of diversity jurisdiction by this Court.⁵

CONCLUSION

After careful consideration, the Court finds that the plaintiff's motion to remand is well-taken and should be granted. A separate order in accordance with this opinion will be entered herein.

This, the _____ day of November, 1999.

W. ALLEN PEPPER, JR.
UNITED STATES DISTRICT JUDGE

⁵ Having so resolved the question of fraudulent joinder in favor of remand due to defendant's failure to satisfy that requirement of diversity, it is unnecessary for this Court to address the amount in controversy question.